# Castle Inn Sdn Bhd v Bumiputra-Commerce Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–1082 OF 2006
LOW HOP BING, SURIYADI AND ZAINUN ALI JJCA
29 AUGUST 2008

*Civil Procedure — Service — Writ of summons — Writ filed but no effort made to serve writ on defendant during writ's validity — Defendant an established bank with fixed address for service — Last-minute attempt to serve writ before expiry thereof — Whether good reasons shown to warrant extension of writ's validity*

*Civil Procedure — Writ of summons — Extension of — Ex parte extension of writ obtained on misleading and material representations — Applicant failing to make full and frank disclosure of material facts — Whether such ex parte application flawed — Whether such ex parte extension ought to be set aside — Principles governing exercise of court's discretion in extending writ's validity*

The plaintiff filed a writ against the defendant on 25 March 2004 but failed to serve it on the defendant within the six-month validity period. The plaintiff then filed an ex parte application to extend the validity of the writ. In support of its application, the plaintiff's director and general manager averred that the plaintiff had been taken over by a 'new management' which had not decided whether to continue with the writ. The plaintiff therefore needed more time before making a final decision. The application was granted by the deputy registrar and the writ was extended for six months, viz from 25 September 2004 to 24 March 2005. The plaintiff served the writ upon the defendant on 9 March 2005 after which the defendant applied to set aside the ex parte extension and to strike out the writ. The defendant's application was dismissed by the deputy registrar but allowed on appeal to the judge in chambers. The judge was of the view that the reason given by the plaintiff was misleading and untrue in that there had been no change in the plaintiff's 'management' or 'manager'; and that the plaintiff had failed to make a full and frank disclosure of all material facts. The plaintiff thus appealed to the Court of Appeal.

**Held**, dismissing the appeal with costs:

(1) The plaintiff's statutory documents filed with the Companies

Commission of Malaysia disclosed that there had been no change in the plaintiff's 'management' since the commencement of the writ on 25 March 2004. The plaintiff's own affidavit further confirmed that the plaintiff had been under the same board of directors since the filing of the writ on 25 March 2004. Further, the plaintiff's Form 49, filed by the plaintiff pursuant to s 141(6) of the Companies Act 1965 disclosed that there was no change to the plaintiff's managers and secretaries. The High Court judge had not erred in his specific finding that there had been no change in the plaintiff's 'management' or 'manager' (see paras 14–16).

(2) Notwithstanding the plaintiff's Form 49 disclosing no change in 'management' or 'manager', the plaintiff had insisted in its supporting affidavit on the change in 'management' or 'manager'. The plaintiff had on that ground, obtained the ex parte extension. That ground was clearly a misleading and material representation (see para 19).

(3) When a party makes an ex parte application of any kind to court, he must make a full and frank disclosure of all relevant matters. Where there is a failure to disclose material facts within the knowledge of a party in an ex parte application, or where there is any material misrepresentation, this will result in the court setting aside the ex parte order obtained. An ex parte application is an application *uberrimae fidei* where the court has to rely on the unilateral version of the applicant who must tell the whole truth. Anything short of utmost good faith will render the ex parte application fundamentally flawed, resulting in the setting aside of the ex parte order obtained (see paras 23–24).

(4) The principles governing the exercise of the court's discretion in extending a writ's validity may be stated thus: (i) the power to extend the writ's validity should only be exercised for 'good reason' — 'good reason' being impossible to characterise and best left to the judge; (ii) whether good reason exists in a particular case depends on all the circumstances in such case; (iii) the balance of hardship between the parties is a relevant matter to consider in the exercise of discretion; and (iv) the discretion belongs to the judge and his exercise of it should not be interfered with by an appellate court except on established special grounds (see para 33).

(5) In the instant case, the plaintiff made no effort to serve the writ upon the defendant — an established bank with a fixed address for service. Mere filing of the writ and holding on to the service, as was done by the plaintiff, did not constitute good reason. Similarly, the last-minute effort by the plaintiff's solicitors to serve the writ did not also constitute 'good grounds' for extension. It was clear that the plaintiff had failed to prove the existence of any good reason to merit the ex parte extension (see paras 39–42).

**[Bahasa Malaysia summary**

Plaintif telah memfailkan writ saman terhadap defendan pada 25 Mac 2004 tetapi gagal untuk menyampaikannya kepada defendan dalam tempoh kesahan enam bulan tersebut. Plaintif kemudian telah memfailkan permohonan ex parte untuk melanjutkan kesahan writ itu. Bagi menyokong permohonannya, pengarah dan pengurus besar plaintif menegaskan bahawa plaintif telah diambil alih oleh 'pengurusan baru' yang belum memutuskan sama ada untuk meneruskan dengan writ itu. Plaintif oleh itu memerlukan lebih masa sebelum membuat keputusan muktamad. Permohonan itu telah diberikan oleh timbalan pendaftar dan writ itu telah dilanjutkan untuk enam bulan, iaitu dari 25 September 2004 hingga 24 Mac 2005. Plaintif telah menyampaikan writ itu kepada defendan pada 9 Mac 2005 selepas itu defendan telah memohon untuk mengetepikan lanjutan ex parte itu dan untuk membatalkan writ itu. Permohonan defendan telah ditolak oleh timbalan pendaftar tetapi dibenarkan atas rayuan kepada hakim dalam kamar. Hakim berpendapat bahawa alasan yang diberikan oleh plaintif adalah mengelirukan dan tidak benar di mana tiada perubahan dalam 'pengurusan' atau 'pengurus' plaintif; dan bahawa plaintif telah gagal untuk membuat pendedahan penuh dan terus-terang tentang semua fakta material. Plaintif oleh itu telah merayu ke Mahkamah Rayuan.

**Diputuskan**, menolak rayuan dengan kos:

(1) Dokumen statutori plaintif yang telah difailkan dengan Suruhanjaya Syarikat Malaysia mendedahkan bahawa tiada perubahan dalam pengurusan plaintif sejak bermulanya writ pada 25 Mac 2004. Afidavit plaintif sendiri selanjutnya mengesahkan bahawa plaintif berada di bawah lembaga pengarah yang sama sejak pemfailan writ itu pada 25 Mac 2004. Selanjutnya, Borang 49 plaintif, yang telah difailkan oleh plaintif menurut s 141(6) Akta Syarikat 1965 mendedahkan bahawa tiada perubahan kepada pengurus dan setiausaha plaintif. Hakim Mahkamah Tinggi tidak terkhilaf dalam penemuan khususnya bahawa tiada perubahan dalam 'pengurusan' atau 'pengurus' plaintif (lihat perenggan 14–16).

(2) Meskipun Borang 49 plaintif mendedahkan tiada perubahan dalam 'pengurusan' atau 'pengurus', plaintif telah mendesak dalam afidavit sokongannya tentang perubahan dalam 'pengurusan' atau 'pengurus'. Plaintif atas alasan itu telah mendapatkan lanjutan ex parte. Alasan tersebut jelas mengelirukan dan merupakan representasi yang material (lihat perenggan 19).

(3) Apabila satu pihak membuat apa-apa jenis permohonan ex parte ke mahkamah, dia perlu membuat pendedahan yang penuh dan terus-terang tentang semua perkara relevan. Di mana terdapat kegagalan untuk mendedahkan fakta material dalam pengetahuan satu pihak dalam permohonan ex parte, atau di mana terdapat mana-mana gambaran salah yang material, ini akan mengakibatkan mahkamah mengetepikan perintah ex parte yang diperoleh. Permohonan ex parte adalah permohonan *uberrimae fidei* di mana mahkamah perlu bergantung kepada versi satu pihak pemohon yang perlu memberitahu kebenaran sepenuhnya. Sikap yang kurang jujur akan menyebabkan permohonan ex parte itu terjejas, mengakibatkan pengenepian perintah ex parte yang telah diperoleh (lihat perenggan 23–24).

(4) Prinsip-prinsip yang mengawal penggunaan budi bicara mahkamah dalam melanjutkan kesahan writ boleh dinyatakan seperti berikut: (i) kuasa untuk melanjutkan kesahan writ hanya patut digunakan untuk 'alasan baik' — 'alasan baik' sukar disifatkan dan lebih wajar diputuskan oleh hakim; (ii) sama ada alasan baik wujud dalam suatu kes tertentu bergantung kepada semua keadaan dalam kes sedemikian; (iii) imbangan kesusahan pihak-pihak merupakan perkara relevan untuk mempertimbangkan penggunaan budi bicara; dan (iv) budi bicara adalah milik hakim dan mahkamah rayuan tidak patut campur tangan dengan penggunaannya kecuali atas alasan istimewa yang dibuktikan (lihat perenggan 33).

(5) Dalam kes ini, plaintif tidak cuba berusaha untuk menyampaikan writ itu kepada defendan — sebuah bank terkemuka dengan alamat tetap untuk penyampaian. Pemfailan writ itu semata-mata dan melengahkan penyampaian itu, seperti yang dilakukan oleh plaintif, tidak membentuk alasan baik. Begitu juga, usaha saat akhir oleh peguam plaintif untuk menyampaikan writ itu tidak membentuk 'alasan baik' untuk lanjutan. Plaintif jelas telah gagal membuktikan kewujudan apa-apa alasan baik untuk mewajarkan lanjutan ex parte (lihat perenggan 39–42).]

**Notes**

For cases on extension of writ of summons, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 8026–8029.

For cases on service of writ of summons, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6313–6320.

**Cases referred to**

*Arab-Malaysian Credit Bhd v Tan Seang Meng* [1995] 1 MLJ 525, CA (distd)

*Baker v Bowketts Cakes Ltd* [1996] WLR 861, CA (refd)

*Baly & Anor v Barrett & Ors* [1988] NI 368, HL (refd)

*Binning Bros Ltd (in liquidation) v Thomas Eggar Verrall Bowles (a firm)* [1998] 1 All ER 409, CA (refd)
*Creative Finishing Sdn Bhd v Wong Koi @ Wong Khoon Foh d/a Syarikat Sri Jaya* [1989] 2 CLJ 93, SC (refd)
*Jones v Jones & Anor* [1970] 2 QB 576, CA (refd)
*King, The v The Special Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond De Polignac* [1917] 1 KB 486, KBD (refd)
*Kleinwort Benson Ltd v Barbrak Ltd and other appeals* [1981] 2 All ER 289, HL (refd)
*Kun Kay Hong v Tan Teo Huat* [1985] 1 MLJ 404, CA (refd)
*Lloyd Triestino Societa v Chocolate Products (Malaysia) Sdn Bhd* [1978] 2 MLJ 27, FC (refd)
*New Ching Kee v Lim Ser Hock* [1975] 2 MLJ 183, HC (refd)
*Yeoh Kee Aun v PI Capital Asset Management Sdn Bhd & Anor* [2000] 4 MLJ 508, HC (refd)

**Legislation referred to**
Civil Law Act 1956 s 11
Companies Act 1965 s 141(6), Form 49
Rules of the High Court 1980 O 6 r 7(1), O 6 r 7(2), O 6 r 7(2A)
Rules of the Supreme Court [UK] O 6 r 8

**Appeal from**: Civil Suit No MT4–22–224 of 2004 (High Court, Johor Bahru)

*DP Vijandran (Robert Devan and Analiza with him) (Devan & Co) for the appellant.*
*Lambert Rasa Ratnam (Sean Yeow with him) (Lee Hishamuddin, Allen & Gledhill) for the respondent.*

**Low Hop Bing JCA (delivering judgment of the court):**

PRELUDE

**[1]** For purposes of simplicity, the parties herein are referred to in their respective capacity in the Johor Bahru High Court.

**[2]** This is the plaintiff's appeal against the decision of the learned High Court judge:

(i) in setting aside the ex parte extension of the validity ('the ex parte extension') of the plaintiff's writ ('the writ'); and

(ii) in striking out the writ.

FACTUAL BACKGROUND

**[3]** The plaintiff was a property development company; and the defendant, a licensed financial institution.

**[4]** On 25 March 2004, the plaintiff filed the writ against the defendant, based on the defendant's alleged breach of contract, and prayed for, inter alia, damages amounting to RM110,990,476.20; further unspecified general and exemplary damages; pre-judgment interest pursuant to s 11 of the Civil Law Act 1956; and costs.

**[5]** As the plaintiff had not served the writ on the defendant within the six-month validity period prescribed in O 6 r 7(1) of the Rules of the High Court 1980, the plaintiff filed an ex parte summons in chambers (encl 5) dated 10 September 2004 to extend its validity. The learned deputy registrar granted the ex parte extension for six months, from 25 September 2004 until 24 March 2005.

**[6]** The ex parte extension was obtained on the basis of the plaintiff's affidavit (encl 4) affirmed by its director and general manager, Mr Tan Hui Boon who averred that the plaintiff has been taken over by a 'new management' which has not decided on whether to continue with the writ, and needed more time to study the facts thereof before making a final decision ('the plaintiff's ground').

**[7]** The writ was only served on the defendant on 9 March 2005, almost a year after it was issued.

**[8]** The defendant then took out a summons in chambers (encl 24) dated 29 March 2005 to set aside the ex parte extension and to strike out the writ. The defendant's application was dismissed by the learned deputy registrar. The defendant's appeal to the learned judge in chambers was allowed and the plaintiff's writ was struck out as its validity had expired.

**[9]** Hence, the plaintiff's appeal to this court.

'NEW MANAGEMENT'

**[10]** In the instant appeal, Mr DP Vijandran (Mr Robert Devan and Ms Analiza Kassim with him) contended, inter alia, that:

(i) the learned judge of the High Court erred in equating the word 'management' with 'board of directors' because, in company parlance, 'board of directors' are not referred to as 'management' and that the definition of 'management' is to be found in the definition of 'manager' in the Companies Act 1965; and

(ii) there was indeed a change in the 'management' since Mr Tan Eng Chia, who was the executive director, and therefore 'the principal executive officer of the company' had resigned.

**[11]** Mr Lambert Rasa Ratnam, assisted by Mr Sean Yeow, responded that the learned judge was correct in setting aside the ex parte extension, as there has been no change in the plaintiff's 'management'.

**[12]** In a speaking judgment, the learned judge had carefully considered the plaintiff's ground. Upon a proper perusal of the various affidavits filed therein, the learned judge found that:

(i) the reason given by the plaintiff was misleading and untrue; and

(ii) the plaintiff had failed to make a full and frank disclosure of all material facts at the time of filing the ex parte application (encl 5) and in obtaining the ex parte extension.

**[13]** Under this head, the question that arises for determination is whether the learned judge has erred in his finding that there has been no change in the plaintiff's 'management', which is essentially a question of fact and not of law.

**[14]** In our judgment, the plaintiff's contention has to be tested against the plaintiff's statutory documents lodged with the Companies Commission of Malaysia and filed in the High Court as exhibits. It is to be noted that the affidavit in support (encl 22) of the defendant's application (encl 24), which was considered by the learned judge, disclosed that the result of the defendant's search of the plaintiff's statutory documents lodged with the Companies Commission of Malaysia revealed no change in the plaintiff's 'management'. The directors of the plaintiff at the material time were appointed in 1990 and 1998, long before the commencement of the writ on 25 March 2004. As a matter of fact, there had been no change since then. Prior to 25 November 2003, the plaintiff's board of directors comprised Dato' Tan Eng Boon, Mr Tan Eng Chia and Mr Tan Hui Boon. On 25 November 2003, Mr Tan Eng Chia, the plaintiff's executive director, resigned as a director and since then, the plaintiff had not found a suitable candidate as executive director. The executive director's resignation on 25 November 2003 took place four months before the writ was filed on 25 March 2004. The plaintiff's own affidavit confirmed that the plaintiff had been under the same board of directors since the filing of the writ on 25 March 2004.

**[15]** The plaintiff's alternative contention, that 'management' is to be equated with 'manager' as defined in the Companies Act 1965, has been demolished by the plaintiff's own statutory document, Form 49, signed by another director Dato' Tan Eng Boon, and filed by the plaintiff pursuant to s 141(6) of the Companies Act 1965. In Form 49, under the title 'Managers and Secretaries', in particular the column 'Nature of Change and Relevant Date', it was specifically stated thus: 'No Change'. Whether or not there has been a change in the plaintiff's 'management' or 'manager' is again a question of fact and not of law. The plaintiff can hardly be expected to go against its own statutory document for the purpose of raising a contention to the contrary. The plaintiff's own statutory document must be given the due weight it deserves.

**[16]** In the circumstances, we are of the view that the learned judge has not erred in his specific finding that there has been no change in the plaintiff's 'management' or 'manager'.

EX PARTE APPLICATION: DUTIES

**[17]** It was argued for the plaintiff that in obtaining the ex parte extension, the plaintiff was not guilty of non-disclosure of material facts; and that the learned judge's finding that the plaintiff had made misleading material representation is erroneous.

**[18]** The defendant stressed that the plaintiff's ground that there has been a change in the plaintiff's 'management' is false and so the ex parte extension has been correctly set aside, having regard to *Baly & Anor v Barrett & Ors* [1988] NI 368 (HL); and *Yeoh Kee Aun v PI Capital Asset Management Sdn Bhd & Anor* [2000] 4 MLJ 508 (HC).

**[19]** In our judgment, the plaintiff's own statutory document in Form 49 is self-evident. It shows that there has never been any change in the plaintiff's 'management' or 'manager'. Notwithstanding that, the plaintiff's affidavit insisted on the change in 'management' or "manager" and had, on that ground, obtained the ex parte extension from the learned deputy registrar. That ground was clearly a misleading material representation.

**[20]** It is an established general rule of law that when a party makes an ex parte application to the court of any kind, he must make a full and frank disclosure of all relevant matters. This general rule applies in particular to an ex parte application for extension of the validity of a writ; and an extension can be refused on this ground alone: per Lord Brandon of Oakbrook, speaking for the House of Lords in *Baly & Anor*.

**[21]** In, *The King v The Special Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond De Polignac* [1917] 1 KB 486, at p 509, Warrington CJ held, inter alia, as perfectly well settled that a person who makes an ex parte application to the court ie in the absence of the person who will be affected by that which the court is asked to do, is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by reason of the order which has thus wrongly been obtained by him.

**[22]** Within our shores, in *Creative Finishing Sdn Bhd v Wong Koi @ Wong Khoon Foh d/a Syarikat Sri Jaya* [1989] 2 CLJ 93, at p 96 (SC), Mohd Azmi SCJ (as he then was) explained that:

(i) in presenting affidavit evidence for an ex parte order, it is incumbent upon an applicant to make full and frank disclosure of all material facts;

(ii) every material representation must not be misleading, and there must not be any suppression of material facts; and

(iii) failure to do so at the crucial time of making the ex parte application would invariably be fatal.

**[23]** A similar sentiment was shown by Steve Shim J (later CJ (Sabah and Sarawak)) in *Yeoh Kee Aun*, at p 514 to the effect that where there is a failure to disclose material facts within his knowledge in an ex parte application by a party or where there is any material misrepresentation, it will result in the court setting aside the ex parte order obtained.

**[24]** I would respectfully add that the *raison d'tere*, for the aforesaid established general rule of law, is that an ex parte application is an application *uberrimae fidei* ie of the utmost good faith and the court has to rely on the unilateral version of the applicant who must candidly and faithfully tell the truth, the whole truth and nothing but the truth. Anything short of that utmost good faith will invariably render the ex parte application fundamentally flawed and on that ground alone, result in the inevitable setting aside of the ex parte order so obtained.

**[25]** Be that as it may, for the sake of completeness, we would proceed to consider the merits ie whether the plaintiff has shown any good reason to merit the ex parte extension.

REASON FOR EXTENSION

**[26]** The plaintiff argued that the plaintiff has shown good reason for

A extension, and relied on the strength of *Jones v Jones & Anor* [1970] 2 QB 576 (CA); *Kleinwort Benson Ltd v Barbrak Ltd and other appeals* [1981] 2 All ER 289 (HL); and *Arab-Malaysian Credit Bhd v Tan Seang Meng* [1995] 1 MLJ 525 (CA).

B **[27]** The defendant recounted the falsity of the plaintiff's ground and reiterated that there was no good reason whatsoever to warrant the court's exercise of discretion to extend the validity of the writ. The following authorities were cited:

C (i) *Lloyd Triestino Societa v Chocolate Products (Malaysia) Sdn Bhd* [1978] 2 MLJ 27 (FC);

(ii) *Binning Bros Ltd (in liquidation) v Thomas Eggar Verrall Bowles (a firm)* [1998] 1 All ER 409 (CA);

D (iii) *New Ching Kee v Lim Ser Hock* [1975] 2 MLJ 183 (HC); and

(iv) *Baker v Bowketts Cakes Ltd* [1996] WLR 861 (CA).

**[28]** The issue under this head is whether the plaintiff has discharged the burden of proving good reason to excuse the delay in effecting service and to E obtain the ex parte extension.

**[29]** For this purpose, it is appropriate to analyse the provisions of O 6 r 7(1), (2) and (2A).

F

**[30]** Under O 6 r 7(1), the writ enjoys a validity period of six months with effect from the date of its issue.

**[31]** Order 6 r 7(2) provides that where efforts to serve a writ on a G defendant have been unsuccessful, the court may by order extend the validity thereof twice, not exceeding six months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order. It is clear from O 6 r 7(2) that upon issuing the writ, the plaintiff is expected to expend efforts to effect service of the writ on the H defendant. Indeed, O 6 r 7(2) contemplates the expeditious service of the writ by the plaintiff on the defendant. Failure on the part of the plaintiff to effect expeditious service thereof would result in the court being inundated with unserved writs, thereby contributing to the infamous backlog of cases. The plaintiff's inaction culminating in total abstinence or lack of efforts in I effecting service thereof is a matter which only the plaintiff can provide a remedy. No blame or culpability can or should be attributed to any person, other than the plaintiff.

**[32]** Be that as it may, in order to obviate the difficulties encountered by legal practitioners, the Rules Committee has enacted O 6 r 7(2A) to confer upon the court the discretion to extend the six-month validity period of the writ, upon the plaintiff's application therefore. A

**[33]** The principles governing the exercise of the discretion may be stated as follows: B

(1) The power to extend the validity of a writ should only be exercised for good reason;

(2) The question whether good reason exists in any particular case depends on all the circumstances in each particular case. Difficulty in effecting service of the writ may well constitute good reason, but it is not the only matter which is capable of doing so; C

(3) The balance of hardship between the parties can be a relevant matter to take into account in the exercise of the discretion; and D

(4) The discretion is that of the judge and his exercise of it should not be interfered with by an appellate court except on special grounds the nature of which is well established (see the speech of Lord Brandon of Oakbrook in *Baly & Anor* (HL); and *Llyod Triestino Societa v Chocolate Products (Malaysia) Sdn Bhd* [1978] 2 MLJ 27 (FC)). E

**[34]** In our judgment, it is quite impossible to define the circumstances which can constitute 'good cause' or 'good reason'. This must therefore be left to the judgment of the first instance judge: see *Jones* and *Kleinwort Bension*. F

**[35]** The facts in *Jones* reveal that on 19 July 1965, the plaintiff was injured when he was a passenger in a motorcar, driven by the first defendant, which was in collision with another car driven by the second defendant. On 13 June 1968, the plaintiff issued a writ which was served on the first defendant on 11 June 1969. The plaintiff's solicitor took the view that having served the writ on the first defendant within the 12-month period under the (English) Rules of the Supreme Court O 6 r 8, the writ would still be valid for service on the second defendant after 12 months, without renewal. He sent the writ to London agents (where it arrived on 17 June) for service on the second defendant. Service was effected on 3 July 1969. The second defendant applied to set aside the service. The writ was, however, renewed and reserved. The second defendant successfully applied to set aside both service and renewal. The plaintiff appealed to judge in chambers who extended the time for service. On the second defendant's appeal, the Court of Appeal held that there were no grounds for interfering with the way in which the judge had exercised his discretion. G H I

A **[36]** In *Kleinwort Benson*, the plaintiff bank, the mortgagee of a ship, issued a writ in 1980 against the owner who owned the greatest amount of the cargo. Since the action could not be tried until 1984, the bank issued an omnibus writ in 1982 (in order to overcome the limitation period) against the other 141 owners of the cargo and their insurers or guarantors. In B October 1983, the bank was granted ex parte extension of the validity of the writ for 12 months. In February 1984, judgment was given against the largest owner and the bank began the process of calculating the amount due to each owner. Pending completion of the calculation process, the bank was granted a further extension of the writ for three months in October 1984. On C 24 January 1985, the bank served the writ. Four of the cargo owners applied to the court to set aside the two extensions of the validity of the writ, but the admiralty judge upheld the registrar's decision. The four cargo owners' appeal was allowed by the Court of Appeal which set aside the service of the writ as the bank had no difficulty in serving it. On the bank's appeal, the House of D Lords allowed the appeal and held that the power to extend the validity of a writ could be exercised if, in the circumstances and balancing the hardship to the plaintiff were an extension to be refused against the hardship to the defendant were an extension to be allowed, there was good reason to do so.

E

**[37]** In our judgment, in *Jones* and *Kleinwort Benson*, the issue of misleading material representation never arose. Further in those two cases, efforts were expended by the plaintiff to effect service of the writ on the defendants. Hence the factual circumstances in those two cases are readily F distinguishable from those prevailing in the instant appeal.

**[38]** In *Arab-Malaysian Credit Bhd*, the plaintiff attempted service of the writ on the defendant guarantor who, having changed his address, failed to keep the plaintiff informed of the change. This resulted in the plaintiff's G inability to effect service. The plaintiff made eight separate and distinct applications for extension of the validity of the writ in accordance with the then O 6 r 7(1). On being served with the extended writ, the defendant applied to set aside the several orders of extension. The registrar refused the defendant's application. The defendant's appeal was allowed by the judge who H set aside the extensions. The Court of Appeal restored the extensions. The crux of the matter there is that the plaintiff's inability in serving the writ on the defendant were engineered by the defendant's change of address, without informing the plaintiff. In other words, the defendant was evading service thereof.

I

**[39]** In the instant case, the defendant is an established bank with a fixed address for service. The plaintiff, having filed the writ, made no effort to effect service. While the facts in *Arab-Malaysian Credit Bhd* are plainly in favour of the plaintiff there, the prevailing circumstances in the instant appeal

clearly militate against the plaintiff herein. Mere filing of the writ and holding on to the service, as has been done by the plaintiff herein, has been rejected as a good reason: See *New Ching Kee v Lim Ser Hock* [1975] 2 MLJ 183 (HC); and *Kun Kay Hong v Tan Teo Huat* [1985] 1 MLJ 404 (CA).

**[40]** A last-minute effort of the plaintiff's solicitors to serve the writ was also held not to constitute good ground for extension: per Lord Denning MR in *Baker*, at p 866.

**[41]** The discretion to extend the validity of a writ should not be exercised indiscriminately, but only where there are good reasons to excuse the delay in service: per Chang Min Tat FJ (as he then was) in *Lloyd Triestino Societa*. See also *Binning Bros*.

**[42]** In our judgment, it is clear that the plaintiff has failed to prove the existence of any good reason to merit the ex parte extension.

CONCLUSION

**[43]** For reasons given above, we are of the unanimous view that the learned judge has correctly exercised his discretion by reference to the facts and circumstances prevailing before him and by applying established judicial principles. The exercise of the discretion by the learned judge is not unprincipled. We find no merits in the plaintiff's appeal which we hereby dismiss with costs. We therefore affirm the orders made by him. Deposit to the defendant on account of taxed costs.

*Appeal dismissed with costs.*

Reported by Andrew Christopher Simon